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CATHY A. CATTERSON
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMRIK SINGH SHERGILL, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	No. 01-70778 INS No. A72-113-426 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted November 6, 2002[**]
San Francisco, California

Before: McKEOWN, PAEZ, Circuit Judges, and POLLAK,[***] District Judge.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Louis H. Pollak, District Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Amrik Singh Shergill, a native and citizen of India, petitions for review of the Board of Immigration Appeals' (BIA's) decision in which it affirmed the immigration judge's (IJ's) denial of his applications for asylum and withholding of deportation, and denied his motions to remand to the IJ. We have jurisdiction under 8 U.S.C. § 1252(b). Because the parties are familiar with the facts, we discuss them only insofar as necessary to reach our decision. We grant the petition and remand to the BIA for further proceedings.

We review the BIA's negative credibility determination, a finding of fact, for substantial evidence.[1] *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141 (9th Cir. 1988); *Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987). We conclude that the BIA did not establish that substantial evidence supported its negative credibility determination, and hence the BIA erred in determining that Shergill was not eligible for asylum or withholding of deportation on that basis.

Neither Shergill's failure to mention his prior arrests in his asylum application nor his omission at the hearing of the three body searches that he described in his asylum application justify a negative credibility determination. The "failure to file an application form that was as complete as might be desired

[1]When, as here, the BIA conducts a *de novo* review of the record, we review its decision rather than the IJ's. *Lal v. INS*, 255 F.3d 998, 1001 (9th Cir. 2001).

cannot, without more, properly serve as the basis for a finding of a lack of credibility." *Aguilera-Cota v. INS*, 914 F.2d 1375, 1382 (9th Cir. 1990); *see also Akinmade v. INS*, 196 F.3d 951, 956 (9th Cir. 1999); *Lopez-Reyes v. INS*, 79 F.3d 908, 911 (9th Cir. 1996). Inconsistencies must be substantial and go to the heart of the asylum claim in order to form the basis for a negative credibility finding. *Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir. 1990); *cf. Pal v. INS*, 204 F.3d 935, 938 (9th Cir. 2000). The events that were "at the heart of" Shergill's claim to persecution — the severe beatings and physical disablement of his brother and the incident in which the village was cordoned off and both brothers' houses searched while they were beaten — were described consistently in both his application and testimony. In contrast, neither the searches nor his brief, uneventful arrests go to the heart of his claim, and thus his failure to reiterate them in every explanation of his asylum claim does not affect his credibility.

Additionally, the discrepancies noted by the BIA with regard to Shergill's views on the necessity of creating an independent Sikh state of Khalistan do not justify a negative credibility determination. In *Damaize-Job v. INS*, we held that discrepancies "that are attributable to the applicant's language problems or typographical errors and cannot be viewed as attempts by the applicant to enhance his claims of persecution have no bearing on credibility." 787 F.2d 1332, 1337

(9th Cir. 1986). Mistranslations and miscommunications cannot form the basis for a negative credibility finding. *Akinmade v. INS*, 196 F.3d at 956–57; *Vilorio-Lopez v. INS*, 852 F.2d at 1142.

Shergill's application for asylum reflects the fact that he is fluent only in Punjabi, not in English. As the transcript of the asylum hearing establishes, he testified through an interpreter. It is significant that throughout his testimony Shergill consistently and repeatedly declared that he did not advocate for the creation of Khalistan or desire its creation. Although Shergill's asylum application stated that he "demanded the peaceful creation of an independent Sikh State of Khalistan," in his testimony Shergill explained that on one occasion, while speaking with members of his gurdwara about the arrests and mistreatment of his brother and other innocent Sikhs, he had said that if Khalistan were created it would "be better than this." It is fully consistent for an individual who has been subjected to persecution to believe that "it would be better" if the government did not include his harassers, without having any intention of advocating for their removal. Shergill's testimony reflects that this is what occurred here. Shergill's asylum application was prepared by a legal assistant, who apparently failed to appreciate this fine distinction. This misunderstanding did not enhance Shergill's claims of persecution, nor did it bear upon his fear for his safety; thus, as in

Damaize-Job, it had "no bearing on credibility." 787 F.2d at 1337. Because the BIA's negative credibility determination is not supported by substantial evidence, Shergill's testimony must be deemed credible. *Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000); *Vilorio-Lopez*, 852 F.2d at 1142.

The BIA denied Shergill's claims for asylum and withholding of deportation and his request to remand for relief under the Convention Against Torture solely upon the basis of its conclusion that Shergill was not credible.[2] We remand to allow the BIA to reach these issues in light of our holding that Shergill must be regarded as credible. *See Chen v. INS*, 326 F.3d 1316 (9th Cir. 2003); *Ventura v. INS*, 123 S. Ct. 353, 355–56 (2002). However, we affirm the BIA's determination that in the instant case the sixteen instances of indiscernible testimony are not alone sufficient to warrant a remand to the IJ.

PETITION GRANTED AND REMANDED.

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[2]We note that despite the INS's representations to the contrary, the BIA's treatment of the Convention Against Torture claim runs precisely contrary to our holding in *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001).